Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DAVID G. YATER AND
PATTEE L. YATER,

PETITIONER,

vs.

HANCOCK COUNTY PLANNING
COMMISSION,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. MAY STATE COURTS EVADE FEDERAL CONSTITUTIONAL ISSUES BY FABRICATING GROUNDS FOR DISMISSAL OF A CAUSE WHICH PRESUME FACTS NOT IN THE RECORD AND IGNORING FACTS THAT ARE?

2. MAY LOCAL GOVERNMENTAL UNITS, WITHOUT EXPRESSED STATUTORY AUTHORITY PREEMPT JURISDICTION GRANTED TO THE STATE BY THE LEGISLATURE?

3. MAY GOVERNMENTAL AGENCIES REQUIRE FORFEITURE OF CONSTITUTIONALLY PROTECTED RIGHTS AS A REQUIREMENT OR CONDITION FOR THE APPROVAL OF A LAND USE PERMIT?

4. MAY STATE COURTS IGNORE PRECEDENTS OF COURTS OF SUPERIOR JURISDICTION?

5. DID THE PLAN COMMISSION DENIAL IN THIS CAUSE VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARE PETITIONERS ENTITLED TO JUST COMPENSATION?

6. MAY PLAINTIFFS RECOVER THEIR COSTS IF THEY PREVAIL IN FORCED LITIGATION?

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The jurisdiction of this Court is sought on the grounds that the decision of the Indiana Court of Appeals provides for an unlawful regulatory taking of property and rights from the Claimants absent compensation as is required by the Fifth Amendment of the United States Constitution.

The decision of the Indiana Court of Appeals was issued on May 24, 1993, Petition For Rehearing was denied on July 20, 1993, and transfer to the Indiana Supreme Court denied on October 12, 1993.

This Petition is filed pursuant to 28 U.S.C.S. SEC. 1257 upon the contention that a property right has been unlawfully taken without just compensation, for the Fifth Amendment to the United State Constitution states in part "Nor shall private property be taken for public use without just compensation."

The Federal Constitutional question was raised in the initial Petition for Writ of Certiorari filed in the Hancock County Superior Court, Item 5, (App. p. 37) and argued extensively by Mr. Robak, my Counsel, in his reply brief to the Indiana Court of Appeals (App. pp. 38-42). The Court of Appeals did

recognize fully that a Federal constitutional claim had been advanced as is evidenced in their decision (App. p. 19) "That they could refrain from deciding constitutional issues if the case could be decided on narrower grounds."

ARGUMENT

The decision of record in this cause was rendered by the Indiana Court of Appeals. The decision is one which did recognize the Federal Constitutional Claim as is evidenced by the language in the decision itself. The decision is also one, we contend, that fabricates conclusions which are unsupported by any evidence in the record and ignores fact and evidence which is in the record to establish narrower grounds upon which to dismiss a Federal constitutional claim and that the decision was rendered in the spirit of avoidance to evade the Federal question.

The subdivision plan which is the subject of this appeal was denied by the Plan Commission on Sept. 20, 1990.

As Petitioners we are obligated to satisfy the minimum requirements of the Subdivision Control Ordinance of the Hancock County Code and if we comply the Plan Commission is mandated by I.C. 36-7-4-707 to grant our permit. Upon submission of our plan we were aware of two (2) sections of the ordinance with which we could not comply and we did choose to contest the Plan Commission's

jurisdiction and authority under those sections. The sections we chose to challenge were 7-39 (1) and 7-39(6). Sec. 7-39(1) of the ordinance (App. p. 54) attempts to control, modify and limit the right of access to a state highway. Our posture in regard to access rights to State Road 9 (hereinafter referred to as S.R.9) since submission of our plans has been that control of access to a state highway is conduct that is expressly reserved to the Indiana Department of Transportation (hereinafter referred to as IDOT) and that there is no statute which permits a local governmental agency to share or usurp that jurisdiction but, rather a statute which expressly prohibits such conduct. We chose to challenge Sec. 7-39(6) (App. p. 54) on the premise that its demand for compulsory dedication dictated that we give to government private property for public use without just compensation in order to receive a land use permit to which we were otherwise entitled and was a constitutionally unlawful demand under both the United States and Indiana Constitutions.

We maintained that the threat of dedication or denial was extortion and that total denial of our permit for failure to

dedicate without compensation was an unlawful act under both constitutions.

At the first Plan Commission Meeting in August of 1990 my Counsel, Mr. Robak, did not think that the Plan Commission fully understood our reasons for non-compliance with the sections in question and asked that the hearing be postponed for thirty (30) days. He requested that the Plan Commission appoint a committee to meet with us so that the issues could be clarified. A committee was appointed, a meeting held and a committee report issued. That report (App. p. 43-44) contained seven (7) conditions and stated the committee would recommend passage if we would comply with those conditions. Compulsory dedication was not a condition. During the meeting with the committee all of the areas of concern, both to the Plan Commission and ourselves, were discussed and although disagreement existed, misunderstanding did not.

At the September 20, 1990 Plan Commission Meeting Mr. Robak informed the Commission that although the State Highway Department had declined a request to identify

existing right of ways on S.R. 9 we had no objection to establishing the building set back line at the edge of the existing prescriptive easement on that road and it would be set at fifty (50') feet from that line. He also informed the Commission that we had no objection to obtaining a vacation notice or variance, from the Drainage Board, for the regulated drain which traversed lots number ten (10) and eleven (11). He informed the Commission further that we had no inclination to comply with the remaining four (4) conditions for the reasons previously discussed with their committee. Those reasons are addressed in depth later in argument.

The Plan Commission did, by unanimous vote, deny our Petition and gave no specific reason or reasons for the denial. Their written notification of denial (R. Petitioners Exhibit 5) also failed to give the specific reasons as required by I.C. 36-7-4-707. Petition for Writ of Certiorari was filed on October 20, 1990 and did lodge a Federal constitutional claim in Item 5. (App. p. 37) We did not know the specific reasons for the rejection of our Petition until the Plan Commission Responded to a Court Order issued on December 20, 1990.

The response (App. p. 46) under 13c did include failure to dedicate right of way as a cause for rejection.

Our refusal to dedicate without compensation created a confusing dilemma for the Plan Commission. They had previously been able, through coercion, to create right of way for public thoroughfares in bits and pieces from individuals and developers through their practice of enforcing the compulsory dedication of Sec. 7-39(6). That policy of establishing right of way had quite conveniently provided that previous Petitioners had to establish the front boundaries of their subdivision lots at the edge of the right of way they had so conveniently been required to establish. Those right of ways so previously established do represent land "appropriated" as defined in Sec. 7-19(s) (App. p. 55) of the ordinance and we contend that such appropriations, absent just compensation, are constitutionally unlawful.

In an attempt to alleviate the dilemma created for the Commission their committee proposed a compromise wherein they could avoid the issues we had presented in reference to sections 7-39(1) and 7-39(6). That compromise provided that

we would not be required to formally dedicate the sixty-five (65) foot strip of right of way, required by the County thoroughfare plan for S.R. 9, but we would rather be required to set aside the existing thirty (30) foot prescriptive easement, for that road and not include it as a part of any lot. They further stated that to conform to their interpretations of Section 7-37(4) (App. p. 55) we must install an accel/decel lane along those lots on S.R. 9. We did reject that compromise on the basis that to set aside the thirty (30) feet strip would force a reconfiguration of the subdivision and a net loss of viable lots and that the set aside requirement was nothing more than a thinly disguised appropriation or taking. We also refused to install the accel/decel lanes because their installation would have imposed an unwarranted economic burden in that neither the ordinance nor the State required such lanes.

The Plan Commission when considering the subdivision did have the option to grant primary approval upon the condition that we dedicate per Sec. 7-27(3) (App. pp. 55) of the ordinance, and the committee was aware of that

option. That option was not considered viable by the Commission for had they approved the plan subject to dedication we would have addressed the dedication - takings issue in a proper action of inverse condemnation and they did not wish to address such an action. They for the same reason did not want to approve the plan subject to the installation of a frontage road and in an attempt to preserve sections 7-39(1) and (6) of their ordinance chose the worst of their alternatives and denied approval of the entire subdivision which in effect unlawfully took from us all right to the residential use for which the property is zoned.

We do not honestly think that the Plan Commission ever grasped the concept embodied in the takings clause of the Fifth Amendment or that when property and rights are taken from so few for a public purpose which will benefit so many that compensation could possibly be required under any circumstance. The prevailing decision of the appellate court has led to a circumstance whereby the Court of Appeals did preclude the Plan Commission from using as reason for rejection our refusal to comply with Sec. 7-39(6) but the Plan

Commission continues, even today, to enforce that section with other Petitioners. We, therefore, must conclude that the Plan Commission did not nor have they yet grasped the constitutional implications of their actions.

The Appellate Court did establish that narrower grounds existed upon which they could justify the action of the Plan Commission and thereby avoid the Federal Constitutional Claim. The Court isolated three (3) areas: lot size, drainage and manner of access upon which they based those narrower grounds. The decision of the Court of Appeals is replete with error and such error will be addressed on the isolated issues in the order in which they appear in the decision.

LOT SIZE

The entire argument presented by the Court of Appeals regarding lot size is nullified by one simple fact. There is no thoroughfare right of way nor any thoroughfare easement, whatsoever, as defined by the controlling ordinance, on the property which is the subject of this cause. Sec. 7-19(s) of the ordinance defines right of way as:

> "A strip of land appropriated ... (App. p. 55)

It further defines easement under Sec. 7-19(h) as:

> "A grant by a property owner for the use of a strip of land by the general public..." (App. p. 56)

None of the property, which is the subject of this matter, has ever been appropriated nor has any grant ever been made. The record may be searched forever but no evidence will be found to support a contention that any right of way or easement as defined by the ordinance exists on our property nor that lot size as submitted does not conform precisely to the standard set forth by Sec. 7-82 of the code. (App. p. 57)

The Plan Commission has at no point contested the fact that we own the subject property. Legal descriptions of the property were submitted with the plans, as required, to the Plan Commission. Those legal descriptions describe and define the boundaries of our property. The Plan Commission has insisted that a lot's size must be exclusive of any

thoroughfare right of way or easement. We would concur that right of way can not be part of a subdivision lot for it would by definition of the ordinance be property which had been appropriated and no longer owned by a Petitioner but in this instance, no defined right of way exists.

We can not concur that a thoroughfare easement must be excluded from lot size. In this instance no grant has been made and that which exists is a prescriptive easement, or one which exists through long standing custom and use, and at no point in the ordinance does it state that lot size must be exclusive of any easement be it prescriptive or by grant. The ordinance does in fact provide that utility easements are incorporated as part of a lot in Sec. 7-42(1) (App. p. 58) and the ordinance utterly fails to distinguish one easement from another. The Appellate Court itself states:

> "although" front property line" is not defined by the ordinance, we can give the term it's generally accepted meaning, zoning ordinance, Sec. 7-118, and conclude that the front property line refers to the boundary of the lot." (App. p. 7 & 8)

This is the precise argument that we have advanced since day one, that the front property line of our lots is the front boundary and that, absent any previous appropriation, is the center of the roads. The Courts have simply refused to recognize that no right of way as defined by the controlling ordinance in Sec. 7-19(s) exists on our property.

In general conversation the terms right of way and easement are usually synonymous and interchangeable but in this instance the controlling ordinance chose to define the terms and apply a distinct meaning and the Plan Commission was bound to observe its own ordinance for also in the words of the Appellate Court itself:

> "the requirement that a zoning ordinance contain a concrete standard is dictated by due process considerations. (Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc. (1979), 181 Ind. 586, 394 N.E.2d 176.
> A standard must be written with sufficient precision to give fair warning as to what the commission will consider in making its decision." (App. p. 15)

We also submit that the Plan Commission may argue exhaustively about a lots definition and requirements but have offered no evidence that the lots as submitted do not have sufficient area for the proper installation of a septic system and that they do not conform precisely to the requirements of Sec. 7-82. Therefore, the decision of the Plan Commission to deny our permit because the lot size did not conform to the ordinance is error and the Court's decision that disapproval was sustained by a reasonable interpretation of the ordinance and evidence is contrary to the ordinance itself and the record lacks any necessary evidence to support such a conclusion.

DRAINAGE

There is no dispute of the fact that the Wicker-Dorman regulated drain traverses lots number 10 and 11 which front on State Road 9 nor of the fact that the drain has been non-operational for forty (40) years nor of the fact that alternate drainage was installed in 1979 to divert the storm water to the Harry White regulated drain nor of the fact that the distal arm of the Wicker-Dorman drain East of State Road 9, serving no

function and being non operational, should have been properly vacated by the Drainage Board long ago.

The technical committee of the Plan Commission included as standing members a County Commissioner, Noble Snodgrass, a member of the Drainage Board, for the County Commissioners are the Drainage Board, and the County Surveyor, David Smoll, under whose jurisdiction regulated drains fall. They recognized the foregoing facts and the technical committee did recommend approval upon a condition that we obtain either a vacation of the drain or a variance to negate its effect on lots number 10 and 11. Lot number 11 was intentionally oversized at 46,000 sq. ft. so that the lot line between lots number 10 and 11 could be altered to include enough area for the installation of a septic system on both lots in the event the Drainage Board chose to issue the variance, which would have reduced the easement from 150 to 50 feet to comply with Sec. 7-41(10). (App. p. 58) Such design also provided the option to amend the primary plat, prior to final approval, and divide lot number 11 into two (2) lots in the event the Drainage Board chose to vacate the drain.

In the event that the Drainage Board had refused to grant either a vacation or variance both lots would have simply been stricken from the plan prior to final approval.

We are not novices and have appeared before the Plan Commission on previous occasions for subdivision approval and were well aware of the Plan Commission's standing policy of granting primary approval of a subdivision subject to the condition that the drainage plan for the subdivision be approved by the Drainage Board prior to final approval. That policy is confirmed to exist per the testimony of Jerry Haynes, the Plan Commission Director at the time of the hearing. (App. pp. 49) Section 7-13(e) of the ordinance under purpose states that a purpose of the ordinance is:

> "To secure equitable handling of all subdivision plan by providing uniform procedures and standards". (App. p. 58)

We state that at no time did the Plan Commission inform us that in this instance we were being required to obtain a partial approval of the drainage plan prior to primary approval nor is there any evidence that such a notice

was issued or that we were so informed that this instance was an exception to the standing rule of procedure.

My Counsel cited the precedent in Johnson County Plan Commission v. Ramshead Corp. on this issue and the Court stated:

> "unlike the Plan Commission in Ramshead, which prematurely denied the Petition before drainage plans could be approved by the Drainage Board, this Commission made its determination only after the developers had indicated their intent not to approach the Drainage Board for a variance or vacation of the drain." (App. p. 20)

Such is not the fact. The stipulation of the Parties, Petitioner's Exhibit 1 (App. pp. 50) Item 9, and the Plan Commission response to Writ of Certiorari, item 7, (App. p. 45-47) set forth plainly that we informed the Plan Commission that we had no objections to obtaining a variance or vacation from the Drainage Board.

We do not argue that lot size is the purview of the Plan Commission but do argue that lot size was given just

and due consideration and that the Plan Commission did deviate without notice from its long standing standard and uniform practice and that in fact we are not indistinguishable from Ramshead on the basis the Court espoused.

The Court also ignored Sec. 7-27(3) of the ordinance which sets forth that a preliminary plat is a guide to the preparation of a final plat (App. pp. 55) and Sec. 7-27(4) (App. p. 56) which provides specifically that storm drainage must be approved by the Hancock County Commissioners, also the Drainage Board, subsequent to preliminary approval and that storm drainage is precisely the drainage that regulated drains address. For all of the foregoing reasons we contend that the drainage issue does not provide narrower grounds for dismissal of the Federal question.

MANNER OF ACCESS

On this issue the Court of Appeals misinterpreted, by definition, State Law, fabricated a conclusion unsupported by the record, upheld a Plan Commission requirement which has no basis and ignored precedents established by Courts with superior jurisdiction.

I.C.9-21-19-1 states:

> "A person may not construct a private entrance, driveway or approach connecting with a highway in the State Highway system...without a written permit from the Indiana Department of Transportation (IDOT)."

I.C. 36-1-8-8 states: "Powers Specifically Prohibited";

> "A unit of [local government] does not have ...(7) the power to regulate conduct that is regulated by a state agency except as expressly granted by statute".

Black's Law Dictionary revised Fourth Edition defines conduct as: "...any positive or negative act" (page 367) and express as "clear; definitive; explicit; unmistakable; ...made known distinctly and explicitly and not left to inference... the word is usually contrasted with implied." (page 691)

Therefore, the grant or denial of an access permit to a state highway is an act positive or negative and as such conduct which is expressly reserved to IDOT and the conclusion of the Court that they may by implication confer

jurisdiction to the Plan Commission to deny such access absent an express grant of such authority by Statute is error of and by definition. There is no express grant by statute under which the Plan Commission may either grant or deny access to a state highway and the Court's attempt to cite I.C. 8-23-6-6 as such is error for that statute refers to excavations or construction openings into a highway and not access onto a highway.

The Court introduces further error when it maintains that its 1975 decision in City of Richmond v. S.M.O. INC establishes that the legislature did not intend for IDOT to have exclusive say over the manner of access to a state highway for the legislature did make its intent known when in 1980 it passed I.C.36-1-8-8 (West 1992) enacted in 1980 and amended in 1987 and 1990 which quite effectively negated that decision by stating that an express statutory grant is necessary for local government to engage in such conduct.

The Court also determined that a legitimate state or public interest was advanced by the denial because "a multiplicity of access points creates unacceptable hazards."

(App. p. 27-28) Where, we ask, is there any evidence in the record to support such conclusion? How did the Court fail to consider the recommendation of the Plan Commission's own committee that eleven access points would be acceptable if we would construct an accel/decel lane or the testimony of Dwayne Myers of IDOT who stated that if the subdivision were approved "more than likely IDOT would grant eleven individual access permits"? (App. pp. 51-53) If IDOT considered a multiplicity of access points to create unacceptable hazards then S.R. 9 would have been declared a limited access road long ago and the record contains absolutely no evidence to support the Court's conclusion.

This Court in Lucas v. South Carolina Coastal Counsel set forth the proposition that government, to prevail, must offer more than a declaration or conclusory assertion to support a land use restraint. We ask, is not the Indiana Appellate Court bound to recognize such standard?

The Court also chose to ignore the holding of the Federal Court in Triple G. Landfills Inc. v. Board of Commissioners of Fountain County. In that decision the

Court stated:

> "The fact that ... may not have intended to preempt local regulations... is irrelevant, since it takes a statute to save an ordinance that regulates conduct regulated by a State agency." at 532

We did, in fact, express that we had no inclination whatsoever to install an accel/decel lane for the eleven lots which front S.R. 9. The reason is quite simple in that the controlling ordinance does not define such lanes and there is no section which requires them. The condition therefore was an unlawful demand per I.C. 36-7-4-707, for it exceeded the standards of the subdivision control ordinance..

The Appellate Court on page 21 of its decision attempts to justify its decision. We must of necessity take issue with the Court. We ask, how can the Court by a simple wave of the judicial wand declare our property to be landlocked? How can we force the State to grant access to S.R. 9 if such right does not already exist? How can we be construed as responsible for defeating and rendering

ineffective Sec 7-39(1) of the ordinance when the legislature through I.C. 36-1-8-8(7) has already done so? Where is there any evidence that the use we propose is inconsistent with other land use in the area or that it will create any unreasonable harm to others and does the Court through this published decision pronounce to the state that we shall now, regardless of the legislatures intent and in order to save the state from its constitutional obligation, permit local governmental agencies to unlawfully preempt the states jurisdiction to deny land use permits and declare such actions to be a reasonable application of the police power and therefore exempt from any constitutional obligation?

We disagree with the summary of the Court in that lot size for each lot in the subdivision does contain 23,000 square feet as measured within the prescribed boundaries of the lots. We did not refuse to obtain a drainage variance or vacation ruling from the Drainage Board. The imposed condition regarding installation of acceleration/deceleration lanes was an excessive and unlawful demand and the Plan Commission's attempt to limit access to S.R. 9 exceeded their

lawful jurisdiction for no statute exists which expressly grants them such authority. Thus the narrower grounds isolated by the Court as justification to avoid a Federal constitutional claim are not valid and the Court by its own proclamation did recognize the claim. This Court in the Lucas decision did further clarify takings precedent under the U.S. Constitution and, under light of that decision, we do submit:

1. The Plan Commission has presented no background principles of nuisance or property law which preclude the use of our property as we have proposed.

2. They have presented no evidence that permits granted to others in the past for the use we now intend stand in jeopardy of revocation.

3. They have provided no evidence that the use we intend will create any unreasonable hazard to the public nor that any legitimate state or public interest is advanced to support the denial.

4. The denial has denied us an economically viable use of our land and;

It is clear that had IDOT denied access permits to S.R. 9 they would have by law been required to compensate (testimony Dwayne Myers). Therefore, we contend that the Plan Commission can presume no less a burden, for as the Appellate Court did state in its decision:

> "Ingress and egress is a property right which can not be substantially or materially interfered with or taken without just compensation." State v. Ensley (1960) 240 Ind. 472, 487, N.E. 2d 342; Huff v. Indiana State Highway Commission (1958) 238 Ind. 280, 286, 149 N.E. 2d 299 (App. pp. 28-29)

42 USCS Section 4654 provides that a Plaintiff, if he prevails, in a takings claim against a Federal agency is entitled to recover reasonable attorney fees and costs. We ask the Court, should not a state or local governmental unit also be so obligated if a Plaintiff prevails? We respectfully contend that when we were compelled by law to either concede to government or litigate to defend our rights that such process, although lawful, imposed a burden not of our

making. We further respectfully contend that the constitutional requirement, in the event we prevail, that we receive just compensation cannot be fulfilled if we are required to take from compensation the expenses of the litigation process imposed upon us. We further respectfully contend that instances do occur wherein the anticipated costs of litigation exceed the value of a taking be it permanent or temporary and that local and state governmental agencies should be compelled to consider the consequences of their actions, for under the prevailing system of procedure they are required to consider only that their burdens may be avoided by compelling Petitioners to proceed through the process of litigation. State and local governmental agencies under the prevailing circumstance have no incentive to address Federal constitutional claims when presented in the first instance but rather have strong incentive to avoid or ignore them for the cost of litigation will force abandonment and forfeiture of some claims for the simple fact that the cost of litigation, if it must be taken from compensation, is not an economically viable option and such are the ways of state

and local governmental agencies.

For all of the reasons herein espoused the action of the Plan Commission to deny our subdivision was, we contend, a "taking" as embodied in the Fifth Amendment of the Untied States Constitution and we are entitled to just compensation for such taking, be it permanent or temporary, plus attorney fees and Court costs incurred to provide that such just compensation is received.

We ask the Court to reverse the decision of the Indiana Court of Appeals and to order that remedy which is most appropriate in the circumstance presented.

Respectfully submitted pro se for circumstance dictates that such must be so.

Respectfully submitted,

by David G. Yater
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APPENDIX

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DECISION FOR PUBLICATION

OF THE COURT OF APPEALS

OF THE FIRST DISTRICT OF

CAUSE NO. 30A01-9211-CV-365

ON APPEAL FROM THE HANCOCK SUPERIOR COURT

THE HONORABLE JERRY M. BARR, SPECIAL JUDGE

CAUSE NO. 30D01-9010-CP-404

David G. Yater and Pattee L. Yater (hereinafter referred to as the developers) appeal the denial of their writ of certiorari by which they sought a court order compelling the Hancock County Area Plan Commission (the Commission) to grant them primary approval of a proposed major subdivision plat.

We affirm in part.

The stipulated statement of facts establishes that the developers filed their petition for primary approval with the Commission on July 31, 1990. A technical committee heard the petition and approved it subject to certain conditions. The Commission heard the petition for the first time on August 16,

1990, but at the conclusion of the developers' presentation and at their request, the Commission again referred the matter to a technical committee which again recommended approval subject to certain conditions.

At the second hearing before the full Commission which followed, the developers, through counsel, represented that they had no inclination whatsoever to comply with the conditions of the subcommittee as recommended and accepted by the Commission and asked for a vote on the petition as it had been submitted. The petition was disapproved by a unanimous vote.

At trial, the parties stipulated that the reasons for the petition's disapproval were six of the seven conditions assigned by the Commission's technical committee before the second hearing on the petition, which were stated as follows:

1. Petitioner to obtain written evidence from the Indiana State Highway Dept. as to the right of way for SR9 at the subdiv. location and building set back line to start at this line.

2. Increase building set back off CR500N to 80' from

the center line.

3. A Drainage variance to be obtained from the Drainage Board, by the petitioner, for lots 10-11.

4. Minimum lot size to be 23,000 [square] feet... excluding any road easement or right of way.

[5]. Construct a (sic) accell/decel lane for the 11 lots on SR9 in lieu of frontage road.

[6]. If no accell/decel lane for all lots on SR9, require an internal road with on (sic) more than two (2) points of access onto SR9.

The stipulated facts and reasons for disapproval are the only record we have of the proceedings before the Commission. For organizational purposes, we have treated the reasons for disapproval under four general topics: minimum lot size, setback, drainage, and access to State Road 9 (SR9).

When an aggrieved party seeks relief in a trial court from an adverse administrative determination and attacks the evidentiary support for the agency's findings, he bears the burden of demonstrating that the agency's conclusions are "clearly erroneous". Town of Beverly Shores v. Bagnall (1992),

Ind., 590 N.E. 2d 1059, 1061. A reviewing court may vacate a board or commission's decision only if the evidence, when viewed as a whole, demonstrates that the conclusion reached by it are clearly erroneous. Id. Such a standard naturally requires great deference toward the administrative board by the reviewing court when the petition challenges findings of fact or the application of the facts to the law. Id. However, if the allegation is that the commission committed an error of law, no such deference is afforded and reversal by the trial court is appropriate if error of law is demonstrated. Id.

In reviewing the decision of a zoning board or commission, this court is bound by the same standard as the trial court. Van Scoik v. Kosciusko County Board of Zoning Appeals (1992), Ind. App., 598 N.E. 2d 594, 595, trans. denied. There is a presumption that determinations of a zoning board, as an administrative agency with expertise in the area of zoning problems, are correct and should not be overturned unless they are arbitrary, capricious, or an abuse of discretion. Id. Thus, a reviewing court does not conduct a trial de novo, even though evidence may have been taken to supplement the

writ of certiorari and return, I.C. 36-7-4-1009, 1016, and may not substitute its decision for that of the board. Scoik, 598 N.E. 2d at 595. If the commission's decision is correct on any of the grounds stated for disapproval, its decision should be sustained. Bagnall, 590 N.E. 2d 1059, 1062.

Lot Size

Section 7-82 of the Hancock County Zoning Ordinance establishes that the minimum lot area for lots proposed in an R-2 district is 23,000 square feet. However, no provision of any of Hancock County's zoning ordinances specifically states where a lot begins or ends. The developers interpret the ordinances to permit a lot to extend to the center line of the existing roadways adjoining the lots, thereby including one-half of the area of the existing right-of-way in the 23,000 required square footage. The Commission has taken the position that the developers must "exclude any road easement or right-of-way" from the minimum lot area. We find support for the Commission's interpretation in the ordinances.

Section 7-41(1) of the Subdivision Control Ordinance provides that "[s]ubdivision lots shall be adequate for the

types of development and land use proposed , and shall conform to the Hancock County Zoning Ordinance requirements." A subdivision lot is "a tract... of land of at least sufficient size to meet minimum zoning requirements for use and area and to provide such yards and other open spaces as are herein required..." Zoning Ordinance of Hancock County, §7-118(27). The term "use" is defined as the "purpose or activity for which land... is designed, arranged, or intended, or for which it is occupied or maintained." Id., §7-118(51).

By the terms of the Subdivision Control Ordinance, a right-of-way is a "strip of land appropriated for public use as a street, highway... or for any drainage or public utility purpose..." It is, by definition, not property owned by the Yaters which they may subdivide into lots to transfer for purposes of residential use, as they have indicated they intend to do with the property which is the subject of their petition. Thus, the ordinances establish that the area within the right-of-way is not part of a subdivision lot.

According to the Commission's witnesses before the

trial court on the writ of certiorari, the reason for the 23,000 square foot area requirement is to provide adequate space for the installation of a septic system, i.e. to permit residential use. Rights-of-ways cannot be used for this purpose. To provide sufficient area for residential use, a lot's dimensions must be calculated based upon area allocated by the subdivider other than the right-of-way.

The definition of "lot" is not the only provision in which the drafters of the ordinances exhibited an intent to delineate the boundary of the right-of-way as the boundary of the lot. One can infer from a comparison of the definitions of "lot width," i.e. "the horizontal distance between the side lot lines of a lot measured along a line drawn parallel to the front property line at a distance equal to the depth of the minimum required front yard," §7-118(31), and the definition of front yard, i.e. "the space not containing any structures between a structure and thoroughfare right-of-way line," §7-118(19), that the drafters of the Zoning Ordinance meant for the front "property" line and the thoroughfare right-of-way line to be the same line. Although "front property line" is not defined

by the ordinance, we can give the term its generally accepted meaning, Zoning Ordinance, §7-118, and conclude that the front property line refers to the boundary of the lot.

To the extent, then, that the Commission disapproved the Yaters' petition because the lots as proposed were of insufficient size to meet the requirements of the zoning ordinances, that disapproval is sustained by a reasonable interpretation of the ordinances and the evidence in support of it.

Setback

The Commission also conditioned approval upon the requirement that the developers obtain "written evidence from the Indiana State Highway Dept. as to the right of way for SR9 at the subdivision location" and start the "building set back line"[1] at this line. The implication of this condition is that the setback in the proposed plat must be at the right-of-way for SR9 as has been determined by the state highway department. The technical subcommittee also imposed the condition that the developers "[i]ncrease building setback off CR500N to 80' from the center line." The proposed plat

contained a setback of 70' from the center of CR500N.

The developers relied upon §7-82 of the zoning ordinance in proposing the location of the setback for the project. This section specifies, in chart form, the size requirements of lots and yards. The reader is referred by an asterisk above the "Minimum Depth Front Yard" column to the statement at the bottom of the page that "[t]he Minimum depth of the front yard (set-back) shall be 70 feet from the center of the road or 50 feet from the road right-of-way, whichever is greater." Since the ordinance gives the "minimum depth front yard" in chart form, the "Minimum depth of the front yard (set-back)" must refer to the location of the setback.

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[1]Section 7-19(c) of the Subdivision Control Ordinance defines the "building line" as a "line drawn parallel to a lot line at a distance there from (sic) equal to the depth of the minimum required yard for the zone in which the lot is located as established by the Zoning Ordinance, contained in this Chapter."

The Commission acknowledges, indeed, utilizes, this provision to partially explain its location of the setback. But, as to the setback along both roads, the Commission now maintains that §7-38(1) and §7-39(6) of the Subdivision Control Ordinance dictate the size of each right-of-way and hence, the location of the setback. At least three reasons emerge from the record for not affirming the Commission's disapproval of the setback on this basis.

First, the Commission stipulated at trial that paragraph 13(c) of its response to the writ of certiorari was not a reason for the disapproval of the developers' petition. Paragraph 13(c) stated that

> [t]he plans as submitted by the Petitioner did not comply with Section 7-39 subsection 6, in that the Petitioners refused to dedicate the additional width along County Road 500 North and State Road 9 so as to insure minimum right-of-way dimensions, which under Section 7-38 subsection 1, is 130 feet for all arterial streets, such as State Road 9.

The Commission argues in its brief

> [s]ection 7-39(6)... required that developers allocate additional property to bring highways up to such width as a condition of approval... The developers did not do so and the result was their lots were undersized and the set back line improperly located.

Appellee's brief, p. 19.

It may have been the Commission's intent to stipulate that the developers' refusal to formally dedicate, that is, open the additional width up to public use, as opposed to merely setting it aside for a future use, was not a reason for the disapproval. But there is a long-standing rule that an ordinance, which requires a local legislative body to give its approval before a certain activity may be conducted, must establish standards by which approval may be granted. Indiana Waste Systems v. Howard County Board of Comm'rs (1979), 180 Ind.App. 385, 389 N.E. 2d 52, 60. Discretion in formulating standards should be exercised when a zoning ordinance is formulated, Suburban Homes Corp. v. Anderson (1970), 147 Ind.App. 419, 261 N.E. 2d 376, 377, not when an

ordinance is applied. Otherwise, discretion only serves to render unpredictable and possibly inequitable decisions if exercised too greatly when a plat proposal is submitted. Id.

Therefore, if the Hancock County ordinance is to fix a definite standard to govern future behavior, the Commission must determine the intent of the provision and apply that construction in all cases. The Commission is now urging on the basis of §7-39(6) that the developers must at least "allocate" additional width to bring SR9 and CR500N up to the width of "dedicated" roadways. Applying this construction to the Commission's stipulation requires that it be bound by it.

Second, the Commission plainly did not apply §7-38(1) and §7-39(6) or §7-82 to the lots adjoining SR9 when it disapproved the petition and its application of the provision to CR500N to require an 80' setback from the center of the road is not adequately explained by the evidence at trial or the Commission's brief. Because setback requirements interfere with the enjoyment of property rights, such requirements must be reasonable. Bird v. Delaware Muncie Metropolitan Plan Comm'n (1981), Ind.App., 416 N.E. 2d 482,

488.

To reiterate, the Commission required the developers to locate the setback at the existing right-of-way on SR9 as determined by the state highway department. It offered no evidentiary justification for placing the setback at this point and made no attempt to reconcile the requirement of §7-82 that the setback be located at the greater of 70′ from the center of the roadway or 50′ from the right-of-way. The Commission argues that §7-38(1) and §7-39(6) warrants disapproval of the proposed 70′ setback, but it does not even tell us where the setback would be if §7-38(1) and §7-39(6) were applied. Moreover, by advocating the use of §7-38(1) and §7-39(6) for SR9, the Commission is changing its reason for locating the setback where it did. It is the Commission's duty in the first instance, regardless of any requests, to furnish the developers with specific and concrete reasons for disapproval so that the developers can amend their plat to comply with the applicable ordinances. Tippecanoe County Area Plan Comm'n v. Sheffield Developers (1979), 181 Ind. App. 586, 394 N.E. 2d 170, 185, n. 13. This duty requires the

Commission to list all reasons at the first reasonable opportunity. Id.

The Commission's footwork with respect to CR500N is even more intriguing. At trial, the former director of planning testified that §7-38(1) required a dedicated right-of-way for CR500N adjoining the subdivision of 60'. From the center of the roadway, the developers should have placed the setback of 80' (one-half of the "dedicated right-of-way plus 50' since the total of 80' feet is greater than 70' from the center of the roadway). Later, the witness acknowledged that the 60' provision did not apply to the developers because the petition was filed after November 20, 1986. He offered no other explanation for the 80' setback.

In its brief, the Commission now maintains that CR500N is a local street which is required to have a 50' right-of-way. If the methodology suggested at trial is employed, than the setback should be located from the center of the roadway at 75' (one-half of the 50' right-of-way plus 50' because the right-of-way plus 50' is greater than 70' from the center). Instead, however, the Commission argues that the

developer should take one-half of the measurement of the existing roadway, which the evidence showed to be 33', add all of the additional width needed to bring the roadway to 50', which the Commission says is 17', for a total of 33 1/2' and add the 50' requirement for the setback. Accordingly, the developers should have located the setback 83 1/2' from the center of the roadway. The Commission contends it gave the developers a break of 3 1/2' by locating the setback at 80' from the center of the road. It makes no attempt to explain why on appeal all of the additional width must be supplied by the developer from his property when at trial the developer only needed to supply half.

The requirement that a zoning ordinance contain a concrete standard is dictated by due process considerations. Sheffield Developers, 394 N.E.2d at 185. A standard must be written with sufficient precision to give fair warning as to what the Commission will consider in making its decision. Id. The manner in which the location of the setback is to be determined is not sufficiently circumscribed; the agency itself cannot agree upon a single application. Under these

circumstances, the ordinance does not give developers fair warning.

Third, merely "allocating" additional width by moving the setback further from the right-of-way does not achieve the goal expressed at trial of ensuring space for right-of-way expansion in the future. We have concluded, as the Commission has argued, that the lot begins at the boundary of the right-of-way; hence, the area between the right-of-way and the setback is part of the lot and may be used for residential purposes. Appropriating the property later for public use as a street or roadway will ultimately preclude the property owner from using that area for a seepage or leaching field, the asserted purpose for requiring 23,000 square feet of lot area.

The Commission's determinations that the setback along SR9 should be located along the existing building line and that the setback along CR500N should be located 80' from the centerline are not supported by a reasonable interpretation of the ordinances nor are they supported by the evidence. The developers' failure to locate the setback as required by the

Commission is not a valid reason for disapproval of their petition.

The developers also argue that application of §7-38(1) and §7-39(6) under the facts of this case constitutes a taking of property without just compensation in violation of the due process clause. We have determined both that the Commission is precluded from asserting §7-38(1) and §7-39(6) as a basis for disapproval of the petition and that application of these provisions does not explain the required location of the setbacks on SR9 and CR500N. However, the Commission was justified in disapproving the petition on the ground that the lots as proposed were undersized. Where as here a case can be decided on narrower grounds, we will refrain from deciding constitutional questions. Bagnell, 590 N.E.2d at 1063.

Drainage

The dispute over drainage concerns the existence of a nonoperational regulated drain known as the Wickard-Doerman which runs through the two northern-most proposed lots that front on SR9, #10 and #11. Section 7-82 of the Zoning Ordinance provides that the minimum lot size for

lots proposed in an R-2 district is 23,000 square feet. Again, the reason for this requirement, according to the Commission's witnesses at trial, is to ensure adequate space for the installation of a septic system.[2] Since the 150' of right-of-way required for the drain cannot be used for a septic system, and the drain dissects the lots, the lots through which the drain runs must be 23,000 square feet exclusive of the right-of-way for the drain. There seems to be no dispute that lots #10 and #11 in the developer's proposed subdivision are too small to meet the requirements of the ordinance regardless of how the square footage is calculated. Accordingly, the technical committee recommended that the developers obtain a variance from the drainage board or get the drainage board to vacate the drain.

The focus of the developers' argument seems to be

Section 7-48(2) of the subdivision control ordinance provides that a "private sewage disposal system for each lot shall be designed in accordance with the minimum requirements of the County Health Dept."

with the Commission's decision to deny primary approval on the basis of the drainage matter, not with the Commission's determination that the lots would be too small without a variance or vacation of the drain. The developers maintain that the Commission's decision to deny approval is arbitrary and capricious because the Commission customarily makes the obtaining of a variance a condition of final approval.

The developers overlook the stipulated fact that they asked the Commission to determine whether the plat as presented to it at the primary approval stage comported with the requirements of the zoning ordinances, representing to the Commission that they had "no inclination whatsoever [of] comply[ing] with the requirements of the sub-committee." Having asked the Commission to approve or deny the plat as presented, the developers cannot now find fault with the Commission for having applied the 23,000 square foot standard at the primary approval stage. Without a variance or vacation of the drain, the lots as proposed do not meet minimum requirements for the installation of a septic system and hence, do not comply with the zoning ordinances.

Johnson County Plan Comm'n v. RamsHead Corp. (1984), Ind.App., 463 N.E.2d 295, is distinguishable on this basis. Unlike the plan Commission in RamsHead, which prematurely denied the petition before drainage plans could be approved by the drainage board,this Commission made its determination only after the developers had indicated their intent not to approach the drainage board for a variance or vacation of the drain. As the court stated in Ramshead, "our decision to reverse the Commission's disapproval is based more on the fact that it really had not authority to hold its public hearing before RamsHead had the opportunity to comply with the ordinances. We do not, and cannot, conclude that such behavior warrants a decision the Commission is estopped from requiring such compliance..." 463 N.E.2d at 304.

To recapitulate, the reason for the disapproval was the drain's effect upon the size of the proposed lots. The developers do not dispute that lot size is within the Commission's purview under the terms of the ordinances. The existence of the drain without a variance or vacation

reduces the size of lots #10 and #11 below the minimum 23,000 square feet required by the ordinances. This is a valid ground for denying approval of the petition.

Manner of Access

As may already be apparent, the proposed subdivision consists only of a series of lots bordering the two existing thoroughfares. The developers proposed that each lot owner would gain direct access to the roadways from driveways on the properties. The Commission approved of such a proposal with respect to the lots along CR500N, a local street, but required that the developers build an acceleration/deceleration lane for the eleven lots along SR9 or provide an internal or frontage road with no more than two points of access to SR9. The developers maintain that Hancock County lacks the authority to control the access along a state highway because that authority has been preempted by state law.

The Home Rule Act, Ind. Code §36-1-3-1, abrogated

the traditional rule that local governments possess only those powers expressly authorized by statute and declared that a local government possesses "all other powers necessary or desirable in the conduct of its affairs." I.C.36-1-3-4(b)(2); City of Crown Point v. Lake County (1987), Ind., 510 N.E.2d 684, 685. The Act specifically provides, however, that a local governmental unit does not have the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute. I.C.36-1-8-8-(7). The legislature has expressly delegated to the Indiana Department of Transportation (IDOT) the authority to consent to openings made in a state highway. I.C.8-23-6-(a); I.C.9-21-19-1.

Hence, the issue before us is whether, by this grant of authority, the legislature intended to preempt the exercise of local governmental control over questions involving access to a state highway. If the state has not chosen to occupy an area the exclusion of municipal regulation, then a city may impose additional regulations, provided the regulations are within the governmental unit's legislative authority and are not in conflict with the rights granted or reserved by the General

Assembly. Medias v. Indianapolis (1939), 216 Ind. 155, 165, 23 N.E.2d 590; Hobble v. Basham (1991), Ind.App., 575 N.E.2d 693, 697; City of Indianapolis v. Fields (1987), Ind.App., 506 N.E.2d 1128, 1131; City of Indianapolis v. Clint's Wrecker (1982), Ind.App., 440 N.E.2d 737, 746; Board of Public Safety v. State ex rel. Benkovich (1979), 180 Ind.App. 294, 388 N.E.2d 582, 585. A review of the statutory provisions at issue indicates, as this court has held, City of Richmond v. S.M.O., Inc. (1975), 165 Ind.App. 641, 333 N.E.2d 797, that the legislature did not intend for the Indiana Department of Transportation to have exclusive say over the manner of access to a state highway.

Generally, the legislation contained in I.c.8-23-6 governs state highways in municipalities. The chapter does not limit the right of a city or town to regulate traffic over a street over which a highway is routed except as expressly provided in the chapter and subject to I.C.9-21. I.C. 8-23-6-5.

The only limitation pertinent to this case found in the chapter is that referred to above, that "[a]n opening may not be made" in a highway, right-of-way or roadway over which

a state highway is routed "without the consent of [IDOT]." I.C. 8-23-6-6(a). The power to regulate is thus restricted insofar as it is used to authorize openings in a highway, its right-of-way or the roadway over which the highway is routed. To that, IDOT must assent.

However, the power to restrict access has not been explicitly made subject to the state's consent. By implication, then, the local governmental unit possesses that power without limitation. I.C.36-1-3-5 (A unit may exercise any power it has to the extent that the power is not expressly granted to another entity). See also, State v. Roberts (1948), 226 Ind. 106, 76 N.E.2d 832 (Predecessor to I.C.8-23-6-6(a) construed not to vest the department with power to forbid or prevent highway from being torn up or cut through by persons lawfully entitled to do so but to give department right and try to see that all such acts are done in conformity with law on subject including regulations of department prescribing time and manner).

The authority to regulate traffic on state highways in municipalities is also "subject to the provisions of I.C.9-21."

I.C. 8-23-6-5. Indiana Code 9-21-1-2(a) expressly authorizes a local authority to adopt additional traffic regulations with respect to highways under the authority's jurisdiction, but the ordinance adopted "may not conflict with or duplicate a statute." Indiana Code 9-21-19-1 provides that "[a] person may not construct a private entrance ... connecting with a highway ... without a written permit from the ... department ..." "The action must be in accordance with the rules and requirements of the department." Id. (Emphasis supplied.) Approval of a permit "shall be subject to the permittee obtaining all necessary approvals involving land use from the ... plan commission ..." 105 IAC 7-1-13.

Indiana Code 9-21 thus imposes no greater limitation upon a local government's exercise of the power to regulate traffic upon a state highway than does the common law. The department's own regulation is an explicit recognition that it perceives its authority to be appropriately limited. See Natural Resources Comm'n v. Porter County Drainage Board (1991), Ind., 576 N.E.2d 587, 589 (Interpretation of statute by administrative agency charged with its enforcement entitled

to great weight).

For these reasons, we reaffirm City of Richmond v. S.M.O. and conclude that it was not the legislature's intent to delegate exclusive authority over access to state highways to IDOT. Local governmental units may also regulate access to state highways over which they have jurisdiction provided the regulations do not conflict with or duplicate a statute. A conflict will be found where an ordinance seeks to prohibit that which a statute expressly permits, but no conflict will be found where an ordinance seeks to supplement the burdens imposed by the statute, provided the additional burdens are logically consistent with the statutory purpose. City of Indianapolis v. Sablica (1976), 264 Ind. 271, 342 N.E.2d 853, 855.

The additional burdens imposed by Hancock County in its zoning ordinances and comprehensive plan do not conflict with or duplicate a statute or regulation, are within the jurisdiction of the county, and are reasonable. Indiana Code 36-7-4-50 provides that a comprehensive plan shall be prepared by the plan commission and approved. The

comprehensive plan must contain a statement of policy for the land use development of the jurisdiction, I.C.36-7-4-502, and may include a plan for the county's thoroughfare system. I.C.36-7-4-503(6). After the plan's approval, each governmental entity shall give consideration to the general policy and pattern of development set out in the plan in the adoption of zoning and land use ordinances. I.C.36-7-4-5-4. No zoning ordinance may be adopted unit a comprehensive plan has been approved for the jurisdiction. I.C.36-7-4-601(a). The legislative body shall act for the purpose of lessening or avoiding congestion in public ways when it adopts a zoning ordinance. I.C.36-7-4-601(c)(2). It may regulate how real property is developed, maintained and used, including standards for traffic circulation. I.C.36-7-4-601(d)(2)(I).

The Hancock County Comprehensive Plan does regulate traffic safety. Under the plan, SR9 is part of the proposed arterial system, because of existing or anticipated traffic volume. Hancock County's arterial system is intended for a large volume of rapidly moving traffic. A multiplicity of access points creates unacceptable hazards for the safe and

efficient movement of traffic. Accordingly, the comprehensive plan instructs that care be taken to protect major roads from congestion due to an excessive number of curb cuts or access points.

Section 7-39(l) furthers the policies and objectives set out in Hancock County's comprehensive plan by restricting the number of streets, driveways, or points of vehicle access onto an arterial street to one. Two such points of access may be permitted by the Commission if the points of access are definitely needed to improve the safety and traffic circulation in the area.

Dwane Myers, the individual who reviews permit applications for highway cuts for IDOT, testified that IDOT would try to limit the number of points of access to a state highway but if the proposed plat were approved and the property subdivided, IDOT would be forced either to permit access for each individual parcel or "take" property. This is so because ingress and egress is a property right which cannot be substantially or materially interfered with or taken without just compensation. State v. Ensley (1960), 240 Ind. 472, 487,

164 N.E.2d 342; Huff v. Indiana State Highway Comm'n (1958), 238 Ind. 280, 286, 149 N.E.2d 299. but, here, the developers already have access to SR9 and are attempting to obtain additional access for a proposed use of their property. In essence, the developers are proposing to create and sell land-locked parcels of land, thereby forcing the state to grant access and extinguish it later by condemnation proceedings. To permit such a procedure would augment the damages to be paid by the state. Moreover, it overlooks the right of the state under the police power to require a citizen to use his property in a manner that will not defeat reasonable regulations or render them ineffective. See id., Reasonable regulations do not take private property merely because they affect the uses to which such property may be put. Spitler v. Town of Munster (1937), 214 Ind. 75, 77, 14 N.E.2d 579.

Thus, Hancock County's policy of regulating land use because of traffic safety considerations is not only consistent with that of the state in granting access, it supplements and furthers it by reducing the cost to the state occasioned by unregulated land use development.

In Summary, the Commission correctly disapproved the developers' plat because the lot size proposed does not meet the ordinance's specifications, the developers have refused to obtain a variance or vacation of the nonregulated drain or provide an acceleration/deceleration lane or frontage road to improve traffic safety. The trial court therefore correctly concluded that the Commission's determination should be affirmed.

Affirmed.

BAKER, J. AND NAJAM, J. CONCUR.

STATE OF INDIANA) HANCOCK SUPERIOR COURT
)SS: CAUSE 30D01-9010-CP-404
COUNTY OF HANCOCK)

DAVID G. YATER AND,)
PATTEE L. YATER,)
)
Plaintiffs,)
)
vs.)
HANCOCK COUNTY)
PLAN COMMISSION,)
)
Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND
ORDER

The Court, having heard the evidence and now being advised, enters the following findings of fact, conclusions of law and Order on same as follows:

FINDINGS OF FACT

1. The stipulation of the Parties is incorporated herein by reference.

2. Pursuant to I.C. 9-4-1-119, the Indiana Department of Transportation has adopted recommendations regarding the

construction of private entrances, driveways and approaches connecting with the state highway system; and said rules and regulations ar contained within a document entitled "driveway permit handbook".

3. The plat as submitted by the Plaintiffs to the Defendant, does not comply with the Indiana Department of Transportation's recommendations as contained within the driveway permit handbook and in the letter of October 5, 1989, from Mr. Dwane Myers, District Permit Engineer for the Indiana Department of Transportation.

4. The Indiana Department of Transportation takes the position that the planning and zoning of a subdivision, including limiting the amount of access points to a state highway is completely within the purview of county zoning officials.

5. Requiring the Plaintiffs to either build an interior frontage road or create an acceleration/deceleration lane for entrance into the lots of the subdivision that adjoin State Highway 9 in Hancock County, Indiana, is consistent with the rules, regulations and recommendations of the Indiana

Department of Transportation, the Comprehensive Plan of Hancock County, Indiana, and the Subdivision Control Ordinance of Hancock County, Indiana.

6. The plat as submitted by the Plaintiffs to the Defendant did not comply with the duly adopted Zoning Ordinance, Subdivision Control Ordinance, and Comprehensive Plan in the following manner:

a. Said plat does not comply with Section 7-39 of the Hancock County Subdivision Control Ordinance in that State Road 9 is an arterial highway under the thoroughfare plan, which allows only one street, driveway or point-of-vehicle access from a subdivision on to such an arterial street.

b. The plans as submitted by the Plaintiffs did not comply with Section 7-39, Subsection 6 of the Hancock County Subdivision Control Ordinance in that the Plaintiffs refuse to either dedicate or agree to the appropriate setbacks along County Road 500 North and State Road 9, which were eighty (80) feet and one hundred thirty (130) feet respectively.

c. The plat as submitted by the Plaintiffs did

not comply with Section 7-37, Subsection 4, in that the subdivision plan was not of such a character that it protected the health, safety and general welfare of the county and its residences, particularly in regard to the number of driveways connecting with State Road 9 North.

d. Pursuant to the Subdivision Control Ordinance and the Zoning Ordinance of Hancock County, Indiana, the minimum lot size is to be measured by that area encompassed by the rear lot line, the side lot liens and the front right-of-way line.

e. The plat as submitted by the Plaintiffs did not comply with the recommendations of the Technical Review Committee in that the Plaintiffs had not requested or obtained a drainage variance from the Hancock County Drainage Board for that area located adjacent to the legal drain contained in lots 10 and 11 of the plat.

7. The Hancock County Comprehensive Plan, Zoning Ordinance and Subdivision Control Ordinance comply with the statutory requirements and directives pertaining to such ordinances as contained in I.C.36-7-4-405, I.C.36-7-4-501,

I.C.36-7-4-506, I..C.36-7-4-601 and I.C.36-7-4-700 et seq.

CONCLUSIONS OF LAW

1. The plat as submitted by the Plaintiffs to the Hancock County Plan Commission did not comply with all requirements of the subdivision control ordinance, zoning ordinance and comprehensive plan of Hancock County, Indiana.

2. The driveway plan as submitted by the Plaintiffs as a part of said plat did not comply with the recommendations of the Indiana Department of Transportation as contained with the driveway permit handbook and the letter of October 5, 1989, from Dwane Myers, District Permit Engineer for Indiana Department of Transportation.

3. The Hancock County Comprehensive Plan, Subdivision Control Ordinance and Zoning Ordinance, are not violative of the United States Constitution or the Constitution of the State of Indiana.

4. The action of the Defendant in denying the Plaintiffs' preliminary plat approval was not an abuse of the Defendant's discretion, oppressive or illegal.

ORDER

IT IS THEREFORE ORDERED by the Court that Plaintiffs Petition be, and the same hereby is, denied and the Hancock County Plan Commission is affirmed herein.

SO ORDERED THIS 10th day of July, 1992.

_____

Jerry M. Barr, Special Judge
Hancock Superior Court

STATE OF INDIANA) HANCOCK SUPERIOR COURT
)SS:
COUNTY OF HANCOCK) CAUSE NO.30DO1-9010-CP-404

DAVID G. YATER and)
PATTEE L. YATER,)
Petitioners,)
)
vs.)
)
HANCOCK COUNTY PLAN)
COMMISSION.)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI

Item 5.

Said rejection is contrary to Indiana Law for the reason, it is believed, that the denial was based upon provisions of the Hancock County Planning and Zoning Ordinance which exceed said Plan Commission's jurisdiction; which are unconstitutional, both under the U.S. Constitution and the Constitution of the State of Indiana and which are contrary to Indiana Law.

ARGUMENT OF MR. ROBAK IN REPLY BRIEF TO THE COURT OF APPEALS PAGES 14-17

.... In any event, the question of constitutionality was properly raised in the writ of certiorari. This case is not a petition for a variance, as the Plan Commission would suggest and therefore Koehler does not apply. Rather the procedure of raising the issue at the writ of certiorari, as described in Metropolitan Board of Zoning Appeals of Marion County v. Gateway Corporation, (1971). 268 N.E. 2d 736, and was properly followed.

As stated in City of Anderson v. Associated Furniture, (1981), 423 N.E. 2d 293,

> "Where a law or the application of a law is challenged on constitutional grounds, the judiciary has the authority, as well as the duty, to explore the constitutional ramifications of the law. As this Court stated in Town of Homecroft v. Macbeth (1958), 238 Ind. 57, 64, 148 N.E.2d 563, 567, when an issue is presented by an owner that there has been an unlawful taking of his property without just compensation in violation of section 21 of Article 1 of the Indiana Constitution and in violation of the due process clause of the Fourteenth Amendment, it is for the courts to protect ultimately the owner's rights and decide the judicial question presented." at 295

However, as submitted above no discussion was held before the trial judge because Counsel for the Plan Commission claimed no dedication of land was necessary. This illegal demand for dedication was the thrust of Yaters position regarding an unlawful taking without compensation. Hence, the Plan Commission now attempts to create a Catch-22 where they would seek to preclude the discussion of the constitutional question based upon their own deception and in view of what the trial judge determined in its findings and conclusions.

The Plan Commission then states on page 31 of their brief that

> "They (Yaters) are not required to dedicate land for the road widening. The only restriction which is being made upon the developers is that the strip of land needed to bring the existing right-of-way of the county road up to the width prescribed by the ordinance is added to the road right-of-way for determining the point from which the set back line is measured."

How is this not a dedication of land? Particularly in view of the zoning ordinance which defines right-of-way as land "appropriated"? Further, compare the passage from page

31 with page 17 of the Plan Commissions brief where they argue that the Yaters must "dedicate additional property to enable the street to meet such width requirements..." or on page 18 where they state that "they conveniently ignore the requirement for the addition of the property by the developer to bring the right-of-way up to the prescribed width however."

Next, the Plan Commission logic would seem that the loss of the additional property for the right-of-way is minor and has nothing to do with road widening. Yet they argue at page 31 of their brief that

> "the developers own an interest in 182 acres behind the proposed subdivision so the increased depth should be feasible... There is no taking of property in this case without compensation."

How can the Plan Commission reconcile the need to take land from acreage not wholly owned by the Yaters and then state that there is no taking? According the Plan Commission, the proof positive that no taking has occurred is the fact that no title has changed hands. The Court in City of Evansville v. Reis Tire Sales, (1975), 333 N.E. 2d 800, stated most succinctly that

> "The cases hold, however, that a zoning ordinance which prevents the use of a particular property for any reasonable purpose is unconstitutional."

Finally, in State v. Ensley (1960), Ind., 164 N.E. 2d 342, 349, the Court addressed the issue involved here squarely with reference to the rights of Yater which were denied by the Plan Commission.

> "We recognize the rule that an abutting property owner has an easement of ingress and egress in a public highway and this constitutes a property right which cannot be substantially or materially interfered with or taken away without due compensation." (Citations omitted)

Without question, the demands of the Plan Commission not only deny the Yaters access to S.R. 9, but the same is confiscated without compensation. As the evidence clearly shows, the State of Indiana had no problems with granting access to S.R. 9 from eleven (11) lots, yet the Plan Commission arbitrarily determined that unless Yater granted the county real estate, he would be denied plat application. Not only is this error but in addition thereto such act is unconstitutional.

It would belabor the obvious to suggest that the Plan

Commissions definition of taking is, at best, incomplete.

Memorandum for the Record August 30, 1990

The Ad Hoc Hancock County Area Planning Subcommittee (Jack Leonard, Larry Ratcliff, Francis Denton, Jerry Haynes, Gregg Morelock) established to consider the Primary Plat for Maxwell Heights Subdivision met at 9:00 A.M. August 30, 1990 in the Law Offices of Robak & Murphy, 504 W. Main St., Greenfield, IN Primary Plat approval is recommended by the Subcommittee subject to the following conditions:

1. Petitioner to obtain written evidence from the Indiana State Highway Dept. as to the right of way for SR9 at the subdiv. location and building set back line to start at this line.

2. Increase building setback off CR500N to 80' from the center line.

3. A Drainage variance to be obtained from the Drainage Board, by the petitioner, for lots 10-11.

4. Minimum lot size to be 23,000 ft., excluding any road easement or right of way.

5. Names of adjacent property owners have been submitted to the Planning Director.

6. Construct a accell/decel lane for the 11 lots on SR9 in lieu of a frontage road.

7. If no accell/decel lane for 11 lots on SR9, require an internal road with on more than two (2) points of access onto SR9.

Jerry R. Haynes

Planning Director

cc: PC Members
PC Atty
Raymond Robak
David Yater
File (2)

bsm

RESPONSE TO PETITIONER FOR WRIT OF CERTIORARI

(R. PP 25-27)

7. At the second hearing on the Petition for Preliminary Plan Approval by Mr. and Mrs. Yater, Mr. Robak made a presentation indicating that he did not disagree with the sub-committee's request that the Petitioners obtain written evidence from the State of Indiana.

13. The Petition of David G. and Pattee L. Yater was denied preliminary plat approval by the Hancock County Plan Commission for the following reasons:

a. Said plat does not comply with Section 7-39 of the Hancock County Subdivision Control Ordinance in that State Road 9 is an arterial highway under the thoroughfare plan, which allows only one street, driveway or point-of-vehicle access from a subdivision onto such an arterial street. Furthermore, when the Petitioners submitted their original plat for Maxwell Heights Subdivision, the Hancock County Plan Commission had the plans reviewed by Dwane E. Myers of the Indiana Department of Transportation, who recommended that the project be required to have either a

frontage road or an internal road as shown by Exhibit "C", attached hereto and incorporated by reference herein, which development of an accel/decel lane or an internal road, was rejected by the Petitioners.

b. Because of Petitioners' refusal to consider installation of an accel/decel or an internal drive, the plan did not comply with the Plan Commission's interpretation of Section 7-37 subsection 4, which indicates that a subdivision layout shall be of such a character that it protects the health, safety, and general welfare of the county and its residents.

c. The plans as submitted by the Petitioner did not comply with Section 7-39 subsection 6, in that the Petitioners refused to dedicate the additional width along County Road 500 North and State Road 9 so as to insure minimum right-of-way dimensions, which under Section 7-38 subsection 1, is 130 feet for all arterial streets, such as State Road 9.

14. The plat plans as submitted by the Petitioners did not comply with Section 7-82, a copy of which is attached hereto as Exhibit "D", showing that the minimum lot area is to be 23,000 square feet for property zoned A-1, such as

Petitioner's property.

15. A lot is defined pursuant to Section 7-118(27) to be a tract or parcel of land of at least sufficient size to meet minimum zoning requirements for use and area and to provide such yards and other open spaces as are herein required, a copy of said section being attached hereto as Exhibit "E" and incorporated by reference herein.

16. A front yard pertaining to a lot, is defined under Section 7-118(19) as to be that space not containing any structures between a structure and the thoroughfare right-of-way line with the definition of frontage to include the width of a tract, parcel of land or lot where it abuts the right-of-way line of a street.

17. The Petitioners have not requested or obtained a drainage variance that would allow the Plan Commission to approve any plat which contains lots configured such as lots ten (10) and eleven are (11) are configured on the Petitioner's plat.

I SWEAR AND AFFIRM UNDER THE PENALTIES OF

PERJURY THAT THE ABOVE AND FOREGOING IS TRUE TO MY BEST KNOWLEDGE AND BELIEF.

_____
Steve Ringer, Secretary
Hancock County Area Planning Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Raymond S. Robak, Robak & Murphy, 504 W. Main St., P.O. Box 606, Greenfield, Indiana 46140 by U.S. mail, First Class postage prepaid this _____ day of January, 1990.

_____
Gregg H. Morelock

Gregg Morelock
COHEN & MORELOCK
P.O. Box 187
Greenfield, IN 41640
(317) 462-7787

Testimony of Jerry Haynes
Plan Commission Director
Record p. 104

"...

Q Alright - now - Item number 3 states that a drainage variance to be obtained from the Drainage Board by the petitioner for lots number 10 and 11, isn't that correct?

A I believe so, yeah - I don't have that in front of me but I wrote it - I think that's true, - yeah.

Q Alright now - is that a precondition to a preliminary approval or is that a condition on preliminary approval before a final approval?

A Well, we usually let them go through preliminary approval and if they'd gotten things corrected in accordance with the ordinance - have them done by the final approval.

Q Right - so therefore - it wasn't denied on preliminary approval because he didn't have a drainage variance did he?

A Probably not - I didn't vote for it but in my opinion it wasn't. ..."

STIPULATION OF THE PARTIES

".....

9. At the second hearing on the Petition for Preliminary Plat Approval by Mr. and Mrs. Yater, Mr. Robak made a presentation indicating that he did not disagree with the subcommittee's request that the Petitioners obtain written evidence from the State of Indiana as to the exact location of the right-of-way for State Road 9 and that the building setback line start from the edge of this right-of-way, nor did he have any objection to the requirement that the Petitioners obtain a drainage variance from the Drainage Board for lots ten (10) and eleven (11).

Testimony of Dwane Myers

Record pp. 173-175 and 196

"...

Q The question is if I come to you as owner of lot number 8 and tell you I'm going to build a house there and my I have a permit for ingress and egress onto State Road 9 - will you grant it to me?

A You have no vested interest in the surrounding round and more than likely, yes, because it's not limited access -- the property does have a right to access to the highway."

"...

Q I understand. Now - did you have a discussion with Dr. Yater - and indicate to him whether or not each of those lots could have ingress and egress as individual lots to State Road 9?

A More than likely yes - because like I said - each - each property owner - in an entity in that it has no vested interest in the adjacent properties - they have a right to access - so if they - if I had 11 property owners then yes, there would probably be 11 driveways in there and we would be forced to issue permits for access to the 11 -

Q Forced or would you be required as a matter of law?

A It would be more of a matter of law unless we deemed it so unsafe in a particular case that they had to purchase the access rights - okay - so no, I'm not going to say no, we would have to give a driveway because there are cases where they say no, this is just so unsafe that we will purchase the access rights, okay - so

Q So you will in effect - condemn, and provide other methods or means of access to the State Road is that correct?

A Well when they purchase the access rights then they don't have to provide access to that.

Q But they have to compensate - for what they take?

A Yes they have to compensate for that take, yes."

"...

Q But if there were 11 lots and 11 property owners came up to you and said we want entrance onto State Road 9 would you grant it?

A More than likely yes."

"...

Sec. 7-39 General Street Standards and Requirements.

(1) Only one street, driveway or point of vehicle access shall be permitted from a subdivision onto a Major Collector Street or an Arterial Street or road. Two or more streets, driveways, or points of vehicle access may be permitted by the Commission only if they are definitely needed to improve the safety and traffic circulation in the area. (Od. No. 1986-11-2, §1,7-45.14, 11-24-1986)..."

§7-39

"(6) In subdivisions that adjoin or include existing streets that do not conform to the minimum right-of-way dimensions as established by this Article, the subdivider shall dedicate additional width along either one or both sides of such streets of inadequate width so as to bring them up to standards, provided the area to be used for widening is owned by the subdivider or under his

control. (Od. No. 1986-11-2, §1, 7-45.19, 11-24-1986)"

§7-19

"(s)RIGHT-OF-WAY: A strip of land appropriated for public use as a street, highway, driveway, alley or walkway or for any drainage or public utility purpose or other similar uses. (Od. No. 1975-2, §219, 9-8-75)"

§7-37 General Provisions.

"(4) The subdivision layout shall be of such a character that it protects the health, safety, and general welfare of the County and its residents. (Od. No. 1986-11-2, §1, 7-45.4, 11-24-1986)"

Sec. 7-27 Review Procedure of Technical Committee.

"(3) Following the public hearing the Commission may then approve the preliminary plat (grant Preliminary Plat Approval), approve subject to conditions, or refer it back to the Technical Committee for review or study on a specific technical matter, or disapprove it. The Commission may require such changes or revisions as are deemed necessary in the interest and needs of the

County."

§7-27

"(4) Subsequent approval will be required of the engineering proposals pertaining to water supply, **storm drainage**, sewerage and sewage disposal, grading and gradients, roadway widths, and the surfacing of streets by the Board of County Commissioners of Hancock County, where concerned, prior to the approval of the final plat by the Commission."

§7-19

"(h) EASEMENT: A grant by a property owner for the use of a strip of land by the general public, a corporation, or a certain person or persons for a specific purpose or purposes. (Od. No. 1975-2, §208, 9-8-85)"

Sec. 7-82 Lot and Yard Requirements.

"District	Minimum Lot Area	Minimum Lot Area Per Family	Minimum Lot Width
R-2	23,000	23,000	115

Minimum Depth Front Yard	Minimum Width Side Yard	Minimum Depth Rear Yard	Minimum Ground Floor Area
50	15	15	1,200"

*The Minimum Lot Area shall be 23,000 square feet if the lot is not served by a community sanitary sewer system approved by the State Board of Health.

**Minimum ground floor area exclusive of open porches, attached garages and accessory structures.

***Minimum ground floor area shall be 750 square feet if the structure is two of more stories.

****The Minimum depth of the front yard (setback) shall be 70 feet from the center of the road or 50 feet from the road

right-of-way, whichever is greater. (Ord. No. 75-1, §211, 9-8-75)

*****The Minimum Frontage for lot on a Cul-de-sac or curve is forty-five (45) feet. (Ord. No. 1987-4B, §1, 04-27-1987)

§7-13

"(e) To secure equitable handling of all subdivision plans by providing uniform procedures and standards. (Od. No 1975-2, §103, 9-8-75)"

§7-41

"(10) Lots abutting a watercourse, drainageway, channel or stream shall have additional minimum width or depth as required to provide an adequate building site and afford the minimum usable area required for front, rear, and side yards. (Od. No. 1986-11-2, §1, 7-45.36, 11-24-1986)"

§7-42 Easements.

"(1) Adequate areas of suitable size and location shall be allocated for utility easements. As a general principle, such easements shall be at least 15 feet in width, shall provide

reasonable continuity from block to block and shall be located at rear lot liens and along side and front lot lines when deemed necessary. (Od. NO. 1986-11-2, §1,7-45.37, 11-24-1986)"